No. 96-827

(19)

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1997

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This is an action brought by petitioner Crawford-El, a long-time prison inmate and experienced *pro se* litigator, against a District of Columbia prison administrator, Patricia Britton. Crawford-El alleges that Britton violated his constitutional rights and seeks damages against her personally.[1/] He alleges that Britton injured him when,

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[1/]The action was also brought against the District of Columbia on the grounds that it had delegated policy-making authority to Ms. Britton. See the Fourth Amended Complaint in the Appendix to Petition for Certiorari ("Pet. App.") 192a, ¶50. The court of appeals has remanded that claim for a determination of "whether a

(continued...)

while he was being transferred through a series of different prisons to a federal facility in Florida, she refused to forward to him three boxes of his property, containing primarily legal documents and law books, but instead gave them to his family. Crawford-El received the boxes about a month after he asked his mother to forward them to him. The injuries that he allegedly suffered were the cost of postage for mailing these boxes (which he paid); the expense of purchasing "underwear, tennis shoes, soft shoes and other items;" and mental distress. Pet. App. 190a-191a.

Crawford-El alleges that Britton "diverted" his property from him in this way in order to punish him for previous exercises of his rights under the First Amendment. She allegedly did this with full knowledge of -- indeed, allegedly because of -- his penchant for suing prison officials, including her. Pet. App. 189a, ¶41(a). Crawford-El sought half a million dollars in damages from Britton -- half, compensatory, and half, punitive. J.A. 16.[2/] Britton has asserted a qualified immunity defense.

After long and complicated proceedings, Crawford-El's complaint was dismissed in the district court on the ground that he had not alleged "direct evidence" necessary to defeat an assertion of qualified immunity. Pet. App. 129a. On appeal, the D. C. Circuit convened *in banc* to review that

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[1/](...continued)
municipal policy or custom has caused a constitutional violation" here. Pet. App. 98a-99a.

[2/]In his first amended complaint, he modified his prayer to a total of $100,000. Joint Appendix ("J.A.") 49. In his current complaint, he omits reference to specific amounts. Pet. App. 193a.

issue.[3/] It held that direct evidence was not required, but that in order to overcome a qualified immunity defense, a plaintiff alleging a motive-based constitutional tort must demonstrate on summary judgment that his claim is supported by clear and convincing evidence. This Court has granted certiorari to review that ruling.

A. THE RELEVANT FACTS

Petitioner Leonard Rollon Crawford-El is serving a life sentence for murder. Pet. App. 3a. At the time he brought this action in 1989, he had been incarcerated in the District's facilities at Lorton, Virginia, since at least 1985. Pet. App. 175a, ¶6.

Crawford-El regularly filed *pro se* actions in federal court. *Id.* at 179a, ¶14 (listing cases). See also Pet. App. 72a n.1 (Henderson, J., concurring below) (listing cases brought by Crawford-El and noting that none had merit). He also sued regularly in local court when he lost personal property. Pet. App. 178a-179a, ¶13; 183a, ¶23.

In December 1988, due to overcrowding in the District's prison system, Crawford-El was transferred to the Spokane County Jail in Washington State, and subsequently to the Washington State prison system. J.A. 11; Pet. App. 179a. At the end of July 1989, Crawford-El began a series of four transfers which took him through five different institutions within 60 days, and eventually brought him to a federal

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[3/]See *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1994), *vacated* 515 U.S. 321 (1995).

facility in Florida at the end of September.[4] Ms. Britton made decisions concerning the transfer of Crawford-El and other District prisoners as part of her duties as Coordinator of Special Projects for the Department of Corrections. J.A. 10; Pet. App. 174a, ¶4.

During these transfers, Crawford-El heard that Ms. Britton had called the relatives of several other prisoners and asked them to take the prisoners' property. *Id.* at 184a, ¶28. Crawford-El called his parents, who told him that his brother-in-law, Jesse Carter, a D.C. Corrections employee, had picked up Crawford-El's property. *Id.* He then called Carter, who confirmed that he had done so, at Britton's request. *Id.* at 185a, ¶29. Carter gave the property to Crawford-El's mother. *Id.* After numerous attempts to have the D.C. Department of Corrections take back his property and mail it to him, Crawford-El had his mother mail it to him in Florida. *Id.* at 185a-188a, ¶'s 30-37.

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[4]On July 28, Washington State prison officials told Crawford-El that he would be returned to the District's prison at Lorton, Virginia. Pet. App. 181a; J.A. 11. On August 9, he was transferred, with other District prisoners, to the Western Missouri Correctional Center in Cameron, Missouri. Pet. App. 182a, ¶20. That prison could not keep all District prisoners who had been sent there; District officials therefore decided to transfer Crawford-El and more than 20 others into the federal prison system. Pet. App. 182a, ¶20; J.A. 36-37. On August 19, Crawford-El was temporarily sent to the District's facilities in Lorton, Virginia, pending a transfer to the Federal Bureau of Prisons. J.A. 12, 37. On September 7, 1989, he was transferred to the Federal Correctional Institution at Petersburg, Virginia, pending further transfer within the Federal Bureau of Prisons. Pet. App. 184a, ¶26; J.A. 13. On September 25, he was transferred from Petersburg to the Federal Correctional Institution in Marianna, Florida, for permanent assignment. J.A. 19.

Britton appears to have given Crawford-El's boxes to Carter by mid-September 1989. J.A. 27. Carter promptly transferred them to Crawford-El's mother. Pet. App. 184a-185a, ¶'s 28, 29; J.A. 19. Crawford-El did not permit his mother to forward them to him until the end of January 1990 (J.A. 40) and he received them in February 1990. Pet. App. 188a, ¶37.

B. THE LITIGATION

Because of the delay in receiving his property, Crawford-El brought this action for damages against Britton and the District of Columbia. He also served Britton with discovery requests, seeking extensive information about her employment history and private life.[5] Britton filed a motion to dismiss, attaching her affidavit J.A. 36-40.

Britton's affidavit stated her reasons for handling Crawford-El's property as she did. In effecting the transfer of prisoners from Washington State, she had decided that all the transferring prisoners' property should be sent to her

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[5]He served interrogatories and a request for production of documents. J.A. 28-35. Among other things, the interrogatories (J.A. 31-35) asked Britton to state her marital status and number of children; her place of residence for the past 10 years; her full educational history; her jobs during the past 10 years, together with her reasons for changing them; whether she had ever been arrested or convicted of any offense, including traffic offenses; whether she was ever reprimanded or transferred "in connection with any implication of wrong doing [sic] or inappropriate action on your part while performing . . . your job . . .." (J.A. 32); and much more. The request for production (J.A. 28-30) sought all lawsuit pleadings naming Britton as defendant; all her employment records; and all inmate complaints or grievances filed against her, among other things.

office in the District of Columbia to "minimize the possibility of its being lost." J.A. 37, ¶5. Crawford-El's property had not arrived at her office until after he had left Lorton. *Id.* at ¶7. By that time, District officials had been told by federal authorities that they would not accept the personal property of D.C. prisoners. *Id.* at ¶8. Britton therefore asked Crawford-El's brother-in-law Carter if "he would take plaintiff's boxes to Mr. Crawford-El's family." *Id.* at 37-38, ¶9. Britton's decision to give Crawford-El's property to his family was not unique to him. She also wrote to other inmates at this time stating that the federal prison authorities would not take their property and asking them to designate someone to whom it could be sent. J.A. 71, 72.[6/]

Crawford-El himself established the governing federal policy concerning the personal property of inmates transferring from D.C. prisons. He attached to his counter-affidavit, D.C. Cir. docket no. 17, a letter that a federal prison official, Mr. Wise, had written to Lorton officials "as clarification relative to DCDOC inmates who transfer to BOP custody." J.A. 52.[7/] Clarification was needed due to "significant differences between DCDOC and BOP property policies and differences between individual BOP facilities." *Id.* See also Pet. App. 188a, ¶35. According to Mr. Wise,

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[6/]The other inmates were James Neal and Richard Ashford. Neal had four boxes of personal property. J.A. 55. While it is not clear how much property Ashford had, he had property shipped from two different locations in the State of Washington. *Id.*

[7/]Judge Williams' opinion mistakenly recites that the Wise letter was "a copy of a letter from the [District of Columbia] Corporation Counsel's office . . .." Pet. App. 32a. However, Mr. Wise's job was "Administrator, Correctional Programs Branch, Bureau of Prisons." J.A. 50. See also Pet. App. 187a, ¶35.

the general rule is that "inmates transferring from DCDOC to BOP custody are permitted only a small amount of personal property which should be limited to personal care items and legal documents." *Id.*

Crawford-El's property was not a small amount; it consisted of "3 very heavy boxes loaded with legal materials and law books." J.A. 47. The boxes also contained personal items, including "underwear, tennis shoes, soft shoes, [and] cosmetics . . .." *Id.* Crawford-El alleged that this material "was the sum total of seven years of his life in prison. All of it accumulated over years . . .." *Id.* at 15. Furthermore, Crawford-El was aware that i) federal policy varied among federal facilities and ii) the Marianna policy would not likely permit him to receive all his property.[8/]

Nevertheless, Crawford-El alleged in this action that the short delay in receiving his property resulted from improper motivation on Britton's part. His original theory was that Britton had deprived him of his three boxes in order to obstruct his access to the courts and impair his ability to prosecute and assist with his ongoing litigation. J.A. 15. When he was required to specify any action in which his litigation was impeded, he alleged that the diversion of his legal materials had resulted in the dismissal of one of his federal *pro se* actions. However, that was demonstrably false;

[8/]Crawford-El attached to his original complaint a letter (J.A. 19-20) stating that "the property [o]fficer here has explained that I may keep all of the property contained [in my boxes] *that is approved for this F.C.I.* [Federal Corrections Institution]." J.A. 20; emphasis supplied. The same letter continued "*Nearly all of the property I have in those boxes will be accepted* and that which is not I am informed will be mailed to the person of my designation." *Id.*; emphasis added.

the suit in question had not been dismissed until well after he recovered those materials. Pet. App. 158a-159a.

Crawford-El added the allegation that Britton's "diversion" of his boxes constituted unlawful retaliation against him for exercising his First Amendment rights. *Id.* at 147a. Specifically, he made new allegations that i) because he had caused Britton unwittingly to approve a visit by a Washington Post reporter in 1986, she had then "promised to make his incarceration as hard on him as possible," J.A. 45, ¶'s 8 & 9, and ii) Britton had told Spokane jail officials in 1988 that Crawford-El was a "legal troublemaker." *Id.* at ¶10. See also Pet. App. 181a, ¶17.[9/]

On the basis of the record before it, the district court dismissed all of Crawford-El's claims.[10/] It dismissed his First Amendment retaliation claim because he had not alleged the kind of "direct evidence" of unconstitutional motivation required by *Siegert v. Gilley*, 895 F.2d 797, 800-802 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226, 231 (1990). Pet. App. 129a. The D.C. Circuit upheld the dismissal of most of Crawford-El's claims, but convened *in banc* to

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[9/]These allegations were added expressly "to comply with *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), and to allege direct evidence of defendant Britton's unconstitutional intent." J.A. 42.

[10/]The record before the court included Britton's affidavit, and other matters outside the pleadings, on which she relied in her memorandum in support of the motion to dismiss (See D.C. Cir. doc. no. 84), as well as two letters (J.A. 71, 72) outside the pleadings on which Crawford-El relied (see D.C. Cir. doc. no. 85). Thus, the proceedings were converted to summary judgment. Fed. R. Civ. P. 12(b).

consider the disposition of his First Amendment retaliation claim.

C. THE *IN BANC* DECISION

The D.C. Circuit held that, in order to defeat a claim of qualified immunity in a case that turns on the defendant's motive, the plaintiff must establish the proscribed motive by clear and convincing evidence. Pet. App. 16a-18a. (Williams opinion). It held further that the plaintiff is not entitled to discovery to oppose a motion for summary judgment based on qualified immunity unless there is a reasonable likelihood that the discovery he seeks will support his specific allegations concerning the defendant's motive, and that, so supported, his evidence will meet the clear and convincing standard. Pet. App. 63a (Ginsburg opinion).

The opinion of the court was authored by Judge Williams. His opinion recognized that in determining the standards applicable to Crawford-El's complaint, the courts must be mindful of the competing goals weighed by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and by the rule of law established in *Harlow* to protect the qualified immunity of public officials such as Britton. Thus, in *Harlow*, Judge Williams noted, this Court balanced the need to vindicate constitutional rights against the need to protect officials from exposure to discovery, trial, and damages that would both divert them from their duties and "unduly chill their readiness to exercise discretion in the public interest." Pet. App. 3a.

Harlow, Judge Williams noted, had found that claims turning on public officials' subjective intent could rarely be disposed of on summary judgment and that discovery and trial over such intent could be "peculiarly disruptive of effective government." Pet. App. 6a (*quoting Harlow*, 457 U.S. at

817). Moreover, Judge Williams noted, the *Harlow* Court had recognized that the constant threats of such claims would "dampen the ardor" of public officials in the "discharge of their duties." *Id.* (*Harlow*, 457 U.S. at 814 (quoting Learned Hand's opinion in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). As a result, Judge Williams wrote, this Court in *Harlow* concluded "that qualified immunity could be penetrated only on a showing of objective unreasonableness" and that such a showing had to meet a rigorous standard of proof: a plaintiff had to prove not merely that an official's conduct violated the law, but that the law was "clearly established at the time [the] action occurred." Pet. App. 6a-7a (citing *Harlow*, 457 U.S. at 817-818).

Unfortunately, Judge Williams pointed out, even though the *Harlow* Court had hoped its adoption of a rigorous objective standard would have "purged [the] qualified immunity doctrine of its subjective components," in practice that has not happened. Pet. App. 7a (*quoting Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985)). And this case illustrates why. It is easy to see, as Judge Williams wrote for the *in banc* court, that if Britton deliberately diverted Crawford-El's property in retaliation for his exercise of First Amendment rights, such a diversion would violate "clearly established" law within the meaning of *Harlow*. Pet. App. 27a. But that does not resolve how Britton's alleged improper intent should be adjudicated.

After canvassing the D.C. Circuit's efforts over 12 years to establish standards for adjudicating such an alleged intent (*id.* at 8a-12a), Judge Williams concluded that a fresh approach was needed. He observed that unconstitutional motivation is "easy to allege and hard to disprove." *Id.* at 17a. He also noted that *Harlow* had determined that the costs to the public of failing to resolve promptly damages actions

against officials are high; indeed, they are so high that they warrant termination of any claim where an official's conduct was not objectively unreasonable under "clearly established" law. *Id.* at 18a.

Judge Williams also observed that, when ordinary rules of litigation have been found to threaten important public policies, a standard judicial response has been to adjust the burden of proof that applies, and that an adjustment employed in a variety of circumstances is to require clear and convincing evidence. *Id.* He found that standard to be appropriate in determining whether an official is entitled to qualified immunity in motive-based cases.[11/] In fact, as Judge Williams explained, the "clear and convincing" standard is consistent with, and follows logically from, the "clearly established" standard in *Harlow*. Both standards are designed 1) to protect public officials from unjustified interference, and 2) to err on the side of protecting these officials when there is doubt about the legitimacy of claims against them. Pet. App. 19a-21a.

[11/]Indeed, Judge Williams notes that in establishing a clear and convincing burden of proof in defamation cases against public officials *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-286 (1964), explicitly drew upon the reasoning of *Barr v. Matteo*, 360 U.S. 564 (1959). *New York Times* "recited *Barr's* entire litany of social costs of officer liability -- essentially those later invoked in *Harlow* -- as a parallel justifying the adoption" of a clear and convincing standard of proof. Pet. App. 21a. He concluded that just as a clear and convincing burden of proof is appropriate in public figure defamation cases, it is equally sound for personal damages cases against public officials involving motive-based constitutional torts. *Id.*

On the related issue of protecting officials from disruptive discovery, Judge Ginsburg's opinion is controlling. *Id.* at 34a. He reasoned that, in assessing whether to stay a motion for summary judgment pending discovery, a district court abuses its discretion if it "fails duly to consider . . . the social costs associated with discovery . . . against a government official." *Id.* at 62a. These costs "as *Harlow* teaches, weigh[] heavily against discovery." *Id.* at 63a. Therefore, faced with a motion for summary judgment, a plaintiff may obtain discovery only if the particular information he seeks will likely permit him to establish impermissible motive under the clear and convincing standard. Pet. App. 63a-64a.

Applying these criteria, Judges Williams (Pet. App. 28a-34a) and Ginsburg (*Id.* at 66a-71a) painstakingly considered Crawford-El's evidence and concluded that, without more, summary judgment should be entered against him under a clear and convincing standard. Nevertheless, because this standard had not been in force previously, the majority remanded the case to allow Crawford-El a further opportunity to adduce evidence. Pet. App. 34a.

Judge Silberman, writing only for himself urged a different approach. He would require that, where a defendant offers an objectively reasonable explanation for the conduct challenged as unlawfully motivated, the official's action should be immune unless the plaintiff can impeach that reason through objective evidence. Thus, after a defendant states her reason, whether the defendant prevails should turn, not on any inquiry into whether she was actually so motivated, but on whether the reason stated is "objectively reasonable under the circumstances." Pet. App. 49a. "[O]nly an objective inquiry into the pretextuality of the reason is allowed." *Id.* at 46a. Such an objective inquiry should be conducted "without regard to [the defendant's] actual intent." *Id.* at 50a. Instead, the

factfinder should ask whether a hypothetical official would have been acting reasonably under the circumstances shown by the plaintiff if such an official were motivated by the stated reason in those circumstances. *Id.* at 49a. Under Judge Silberman's approach, therefore, to avoid summary judgment, the plaintiff must create a dispute of fact about whether a hypothetical official could have acted reasonably if he had acted for the reason posited. *Id.*

Judge Silberman found Judge Williams' approach preferable to that of Judge Edwards. Pet. App. 45a. Judge Silberman also agreed with Judge Ginsburg concerning limiting discovery.[12/]

Judge Edwards, speaking for five judges (Pet. App. 78a), would hold that no heightened standard should be applied under *Harlow* at all. And, in his view, Crawford-El's case was sufficient to withstand a motion for summary judgment and to go to a jury. *Id.* 92a- 94a.[13/]

[12/]Judge Silberman agreed with Judge Williams as to the limited extent to which discovery concerning state of mind is permitted (*i.e.*, to establish what the defendant knew, not why he acted). *Id.* at 45a n.9 ("I . . . agree that a plaintiff is entitled to discovery for certain other purposes.").

[13/]From his first (J.A. 16) to his last (fourth amended) (Pet. App. at 194a) complaint, Crawford-El demanded a jury trial.

SUMMARY OF ARGUMENT

Harlow v. Fitzgerald recognized that permitting lawsuits seeking damages personally against government officials because of their allegedly improper motives entails substantial costs to effective government. These costs include the diversion of public officials from their duties while answering discovery and preparing for, and participating in, trial; heightened risks that juries will award damages on unfounded claims; and severe inhibitions placed on public servants by such diversions and risks. As a result, the *Harlow* court defined a qualified immunity for public officials that required claims to be tested by a rigorous objective standard: only if a plaintiff could show that the alleged wrongdoing violated "clearly established" law could a claim proceed.

In the 15 years since *Harlow* was decided, the courts have wrestled with the problem of how to implement that decision in cases where an official's conduct is alleged to be unlawful solely because of his motive. The D.C. Circuit has now decided that the best way to do so is to require plaintiffs who allege such claims to overcome an assertion of qualified immunity by clear and convincing evidence.

For three reasons, the D.C. Circuit's adoption of a clear and convincing standard is the most sensible application of *Harlow* to motive-based cases. First, that standard will ordinarily permit the prompt termination of nonmeritorious claims, while permitting those supported by substantial evidence to proceed. Second, the standard strikes the same balance *Harlow* did, preferring to protect public officials from the disabling effects of numerous insubstantial claims, even at the risk that a few meritorious claims will be cut short. Finally, the more rigorous "clear and convincing" standard mirrors *Harlow*'s "clearly established" standard, and does so

to protect the same values, and to give the same benefit of the doubt to public officials, reflected in *Harlow*.

However, the clear and convincing standard on summary judgment cannot alone effectuate *Harlow*. The D.C. Circuit held that a district court should deny discovery except when the evidence sought is reasonably likely to provide the plaintiff with the necessary quantum of proof to prevail on his claim. Such a limitation follows from *Harlow*, and should be effected by the district courts to the protect the public policies identified in that case.

None of the objections made to the D.C. Circuit's effectuation of *Harlow* has merit. The claim that ordinary procedural rules should have governed the case ignores the special protections required by *Harlow* to protect the public interest. "[T]he qualified immunity recognized in *Harlow* acts to safeguard government, and thereby to protect the public at large . . .." *Wyatt v. Cole*, 504 U.S. 158, 168 (1992). The claim that only standards recognized at common law are permissible here was rejected by *Harlow* itself. And the contention that the D.C. Circuit's standard created a special rule for motive-based cases is simply incorrect; in fact, the D.C. Circuit's rule is the most sensible effectuation of *Harlow* and is fully consistent with the balance struck in that case. The rule should therefore be upheld by this Court.

ARGUMENT

THE CLEAR AND CONVINCING STANDARD, COUPLED WITH RIGOROUS DISCOVERY REQUIREMENTS, CONSTITUTES THE MOST SENSIBLE APPLICATION OF *HARLOW* TO MOTIVE-BASED TORTS .

INTRODUCTION

In *Harlow*, the Court "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). Moreover, "*Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'" *Id.*

Unfortunately, as this case illustrates and as Judge Williams' opinion explains, it is not clear how *Harlow* applies "across the board" where, as here: a plaintiff alleges that official conduct was improperly motivated; the official denies that improper motivation and offers an objectively reasonable explanation for her conduct; but the plaintiff still insists on full-blown discovery regarding her motives and insists that he is entitled to a jury finding regarding those motives.

Judge Silberman thought that, under *Harlow*, a defendant's objectively reasonable explanation for her conduct was enough to immunize her from further inquiry and to require entry of summary judgment in her favor. Pet. App. 48a-52a. Chief Judge Edwards thought, much to the contrary, that a defendant's objectively reasonable explanation gained

her nothing and that, provided plaintiff could produce "nonconclusory allegations of evidence" of defendant's unconstitutional intent, he was entitled to proceed with discovery and trial as in any other case. Pet. App. 84a (*quoting Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985)). In other words, Chief Judge Edwards thought *Harlow* had little, if anything, to say about the standard that should apply here.

Judge Williams, between the two, thought it followed from *Harlow* that some kind of heightened standard had to be applied to one in Crawford-El's position, else the balance struck in *Harlow* would be undone and the values it sought to advance would go unprotected. He therefore concluded that the readily available "clear and convincing" standard, which had been applied by the courts in analogous circumstances and which was substantively close to the "clearly established" standard *Harlow* had already adopted, should be applied here.

While a case can be made for Judge Silberman's view, his approach may not sufficiently protect meritorious claims against public officials who, even though they articulate an objectively reasonable explanation for their conduct, in fact were motivated by an unconstitutional animus. At the same time, where such officials do articulate an objectively reasonable explanation, we believe Judge Williams is right that only a plaintiff's clear and convincing showing of improper intent should be enough to survive summary judgment. We also believe that Judge Ginsburg is right that discovery should proceed against such a defendant only on a plaintiff's showing of a "reasonable likelihood" that the requested discovery will lead to evidence sufficient to meet the clear and convincing standard. We therefore urge this Court to uphold Judge Williams and Ginsburg on those two points.

We present our support for this position in three parts. First, we reiterate the key components of *Harlow* that are pertinent to the questions presented. Second, we explain how the "clear and convincing" standard of proof and the "reasonable likelihood" standard of discovery effectively implement *Harlow*. And finally, we answer the objections to those standards offered by Crawford-El, his amicus, and the dissenting opinion below.

A. *HARLOW* WAS BASED ON THE SUBSTANTIAL PUBLIC INTEREST IN PROTECTING PUBLIC OFFICIALS FROM SUIT.

As noted, *Harlow v. Fitzgerald* substantially reformulated the law of qualified immunity for government officials. It did so because "substantial costs attend the litigation of the subjective good faith of government officials." 457 U.S. at 816. *Harlow* identified three such costs.

The first cost is simply the burdensome nature of litigating motive, both through discovery and at trial. "Judicial inquiry into 'subjective motivation' may entail broad-ranging discovery . . .." *Id.* at 817. This is because "there often is no clear end to the relevant evidence . . .." *Id.* As a result, such discovery is often "wide-ranging, time-consuming and not without considerable cost to the official involved." *Id.* at n.29 *quoting Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring), *aff'd in pertinent part by an equally divided Court*, 452 U.S. 713 (1981). "Inquiries of this kind can be peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817. Moreover, this disruptive effect is magnified by the difficulty of dismissing insubstantial lawsuits without trial. This is because

"questions of subjective intent . . . rarely can be decided by summary judgment." *Id.* at 816.

The second significant cost associated with claims of wrongdoing against government actors is "the risk imposed upon political officials who must defend their actions and motives before a jury." *Harlow*, 457 U.S. at 814 n.23. That risk, the *Harlow* Court explained, is that political officials even when acting in utmost good faith, are all too readily disbelieved: "[A]s the Court observed in *Tenney*: 'In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed.'" *Id.* (*quoting Tenney v. Brandhove*, 341 U.S. 367, 378 (1951)). This is exacerbated by the fact that, as pointed out by Judge Williams, "unconstitutional motive is . . . easy to allege and hard to disprove." Pet. App. 17a.

The final significant cost is a product of the first two: the constant diversion from performance of duties, and the risk of financial penalty for unfounded claims of wrongdoing, will not only deter "able citizens from acceptance of public office," *Harlow* 457 U.S. at 814, but for those who do accept, "the fear of being sued will 'dampen the ardor of all but the most resolute or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Id.*, *quoting Gregoire v. Biddle*, 177 F.2d 579 at 581. This last cost is even clearer now than when *Harlow* was decided. As one commentator has summarized the evidence:

> Aversion to the risk of a lawsuit increases as the individual defendant occupies a decreasingly significant position and presumably has little wealth. Yet low level officials are the ones increasingly being sued in their individual capacities for constitutional torts. *The "street-*

> *level" public official will go to great lengths to avoid the personal calamity of being named as the defendant in a lawsuit, and such an official is well situated to engage in self-protective strategies*, such as inaction, delay, formalism, and substitution of low risk acts for higher-risk acts.

William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 Admin. L.J. Am. U. 1105, 1160 (1996) (footnotes omitted; emphasis added).

Thus, the special costs of litigating officials' motives are: a) the greatly increased burdens of litigation; b) the enhanced risks of erroneous judgments against officials; and c) the consequent deterrence of officials from doing their jobs responsibly and effectively caused by fear of lawsuits and their attendant burdens and risks. Significantly, these are costs "not only to the defendant officials, but to society as a whole." *Harlow*, 457 U.S. at 814. And, as a result of these costs, safeguards are necessary to ensure that "public officials are able to act forcefully and decisively in their jobs." *Wyatt v. Cole*, 504 U.S. at 168.

B. THE "CLEAR AND CONVINCING" STANDARD BEST IMPLEMENTS *HARLOW*.

After considerable trial and error, the court below in this *in banc* case has reached what we consider to be the best effectuation of *Harlow* in motive-based tort cases. To see why that is so, it is worth reviewing the previous efforts to implement *Harlow*.

Prior to *Harlow*, an official accused of a constitutional violation was immune from personal liability unless *either* he knew or reasonably should have known that his conduct would violate the plaintiff's constitutional rights *or* he took the action with the malicious intention of causing constitutional injury. 475 U.S. at 815. In other words, the immunity defense had both an objective and a subjective component.

Harlow, however, theoretically "purged immunity doctrine of its subjective component[]. . .." *Mitchell v. Forsyth*, 472 U.S. at 517. Henceforth, the test was to "focus[] on the objective reasonableness of an official's acts." *Harlow*, 457 U.S. at 819. In order to defeat the assertion of qualified immunity, a plaintiff could no longer prove that the official acted in bad faith. "[S]ubjective beliefs . . . are irrelevant." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Instead, the plaintiff had to show that the official violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Furthermore, "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Id.* at 818.

A straightforward reading of *Harlow* would foreclose entirely any inquiry into an official's state of mind even in motive-based cases. *Halperin v. Kissinger*, 807 F.2d 180, 185-186 (D.C. Cir. 1986), stated that such a reading would "give genuine effect" to *Harlow*'s "reliance on objective reasonableness." *See also Martin v. Metropolitan Police Department*, 812 F.2d 1425, 1432 (D.C. Cir. 1987) (similarly recognizing that a straightforward application of *Harlow* would preclude all inquiry into motivation). Judge Silberman argued for such a position here; *i.e.*, that an official charged with a motive-based tort would be entitled to immunity so long as the purported motivation for the official's action was objectively reasonable in the circumstances. Pet. App. 49a-50a.

Judge Silberman argues that nothing less will effectively respond to the difficulty of defeating summary judgment in motive-based cases. *Id*. at 47a. He also contends that, while his position may deter unconstitutional action by officials to a lesser extent than does the clear and convincing standard, there are other disincentives to unconstitutional actions -- ranging from damage to reputation, to discipline by employers or reduced opportunity for advancement, and including specific criminal provisions and statutory claims. *Id*. at 52a-53a. At the same time, of course, Judge Silberman's approach serves to protect all the interests, and to avoid all the substantial costs, identified in *Harlow*.

We believe Judge Silberman's arguments have force. No other position avoids entirely litigation over subjective motivation and the attendant burdens of discovery and inability to terminate claims promptly. But we do not endorse his position because we believe it could "radically alter the existing balance with respect to claims of constitutional deprivations." *Martin*, *supra*, 812 F.2d at 1433. That is to say, his approach may foreclose claims merely because the public official is able to articulate an objectively reasonable basis for her conduct.

Another approach many of the courts of appeals have tried is requiring plaintiffs to plead motive-based claims with heightened specificity, and to require their resolution on the pleadings, thus foreclosing discovery.[14/] Indeed, the D.C.

[14/]See, *e.g.*, *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3rd Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989); *Gooden v. Howard County, Md.*, 954 F.2d 960, 969-970 (4th Cir. 1992) (*in banc*); *Eddington v. Missouri Dept. of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995); *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th (continued...)

Circuit was initially among them.[15/] However, there are substantial difficulties with this approach. The most serious is that, under the Federal Rules of Civil Procedure, the pleading requirements are designed to provide sufficient notice to permit responses; they are not designed to weed out claims that are insubstantial. *See In re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1546-1549 (9th Cir. 1994) (*in banc*) (arguing that the particularity requirement of Fed. R. Civ. P. 9 (b) requires an explanation of why a statement was false, but does not require the pleading of evidence from which it can be inferred that the defendant knew it was false). Indeed, in *Schultea v. Wood*, 47 F.3d 1427 (1995) (*in banc*), the Fifth Circuit points up the problem when it defines the quantum of particularity that will be sufficient to satisfy its heightened pleading standard: "The district court need not allow any discovery unless it finds that plaintiff has supported his claim with sufficient precision and factual specificity *to raise a genuine issue as to the illegality of defendant's conduct* . . .." *Id*. at 1434; emphasis added. But, under the Federal Rules, determining whether there is a "genuine issue as to any material fact" is specifically the function of summary judgment, and not of pleading.

Yet another response to the problem here is the D.C. Circuit's decision in *Martin v. Metropolitan Police*

[14/](...continued)
Cir. 1991); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992).

[15/]*See Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984) *cert., denied*, 470 U.S. 1084 (1985) ("in cases involving unconstitutional motive, we will require that non-conclusory allegations of evidence of such intent be present in a complaint for litigants to proceed to discovery on the claim.")

Department. That decision recognized that motive-based cases require a standard providing heightened assurance that a plaintiff's claim has merit, and a concomitant restriction on the factfinder's ability to base liability on evidence that is only weakly probative. 412 F.2d at 1435-1436 (*citing Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) and other antitrust cases requiring enhanced proof of conspiratorial conduct). Unfortunately, some of the language in *Martin* led the D.C. Circuit to adopt a bright line test in which a plaintiff was required to produce direct, rather than circumstantial, evidence of his claim. *See, e.g., Kimberlin v. Quinlin*, 6 F.3d 789, 797 (D.C. Cir. 1993), *vacated* 515 U.S. 321 (1995). That standard, however, was deficient because "[c]ircumstantial evidence may be as probative as testimonial evidence." *Seigert v. Giley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring). The *in banc* D.C. Circuit has now rejected that standard, for that reason. Pet. App. 11a-12a (Williams opinion).

These previous efforts to find a statutory implementation of *Harlow* in motive-based cases all underscore two important points. The first is that, as Justice Kennedy pointed out in *Siegert v. Gilley*, "[t]here is tension between the rationale of *Harlow* and the requirement of malice." 500 U.S. at 235-236 (Kennedy, J., concurring). This tension makes a workable rule difficult to formulate. *Id*. The second important point is the one Judge -- now Justice -- Ginsburg made in *Martin*: that whatever rule is selected, it must recognize that the *Harlow* Court's "'strong condemnation of insubstantial suits against government officers impels the application of *a standard more demanding of plaintiffs when public officer defendants move for summary judgment* on the basis of their qualified immunity." *Martin v. Metropolitan Police Department*, 812 F.2d at 1435 (emphasis added), *quoting Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984).

We submit that the "clear and convincing" rule adopted by the *in banc* D.C. Circuit in this case is the best means of resolving the tension noted by Justice Kennedy, and of implementing the more demanding standard Justice Ginsburg concluded was necessary to protect the values articulated in *Harlow*. We say this for three reasons.

First, as *Harlow* observed, "[i]t is not difficult . . . to create a material issue of fact where . . . a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection . . . would usually, under normal summary judgment standards, be sufficient . . .." 457 U.S. at 817 n.29, *quoting Halperin v. Kissinger*, 606 F.2d 1217. Because an issue of motive can so easily be raised, the careful balance struck in *Harlow* could just as easily be destroyed if public officials had no further special protection from claims of wrongdoing once the motive issue is created. The clear and convincing standard provides such protection. It permits the prompt termination of motive-based claims with little substance, while allowing those that are supported by substantial evidence to proceed.[16/]

Second, while adjusting the standard in this way may preclude some claims which have merit, failing to do so will

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[16/]The clear and convincing evidence standard is an effective means of separating substantial claims from the insubstantial, and has long been employed for that purpose in a variety of situations. See *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 n.18 (1996) (clear and convincing standard "has traditionally been employed in cases involving civil fraud and in a variety of other kinds of civil cases . . .."), *citing* 9 WIGMORE ON EVIDENCE, § 2498 (3rd ed. 1940) (stating (at 329) that this standard "is commonly applied to measure the necessary standard of persuasion" in 10 categories of civil cases and sundry others).

permit many claims which are insubstantial to continue to burden officials, deterring them from responsibly performing their jobs, and threatening them with unjustified liability. As Judge Hand said in *Gregoire*, 177 F.2d at 581:

> There must be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed . . . wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

The best means of achieving the balance identified in *Gregoire* and *Harlow* is through the clear and convincing standard.

Finally, the clear and convincing standard is a sensible and logical extension of the "clearly established" rule adopted in *Harlow*. When the issue was objective reasonableness, the Court in *Harlow* required a plaintiff to show that a public official acted unreasonably under "clearly established" law; otherwise, the official would be given the benefit of the doubt and would be assumed to have acted in good faith. By the same token, this same official should receive the same benefit of the doubt when the issue is one of subjective unreasonableness. Unless the plaintiff shows by clear and convincing evidence that the official acted with an unlawful motive, he should be assumed to have acted in good faith.

While for all these reasons, we think the clear and convincing standard is the best implementation of *Harlow*, this

standard alone is not enough to fully implement *Harlow*. The discovery protection provided by the D.C. Circuit through Judge Ginsburg's opinion is necessary as well.

"[A]voidance of disruptive discovery is one of the very purposes of the immunity doctrine . . .." *Siegert v. Gilley*, 500 U.S. at 236 (Kennedy, J., concurring). Yet, without limits set by this Court, there is a danger that district courts will permit the very discovery burdens *Harlow* sought to avoid.

Normally, discovery is available if it is relevant to a material issue and not privileged. Fed. R. Civ. P. 26(b)(1). The district courts are given broad discretion to regulate discovery, governed generally by their assessment of whether the expense of providing it outweighs the likely benefit to the party seeking it. Fed. R. Civ. P. 26(b)(2); 8 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE (2nd Ed. 1994), § 2008.1 at 122. In cases involving alleged improper motivation, the courts generally exercise this discretion to provide discovery liberally. *See, e.g., Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1519-1520 (10th Cir. 1995) (Individual age discrimination plaintiff given access to 400 personnel files before discovery limited). The dissenting judges below argued that precisely these principles should be applied: discovery of any evidence likely "to buttress the claim," Pet. App. 84a (Edwards opinion), limited only by the district court's broad discretion, *id.* at 83a n.5, 84a n.6.

In order to give effect to *Harlow*, however, discovery must be more limited. Judge Ginsburg attempted to formulate those limits. Under his approach, in order to obtain discovery a plaintiff must show more than that such evidence *might support* his case, but instead that the evidence he seeks, together with what he has, is *reasonably likely to establish his*

case. Pet. App. 63a. Judge Ginsburg properly held that "the district court abuses [its] discretion if it fails duly to consider not only the competing interests of the parties -- as in any civil litigation -- but also the social costs associated with discovery against a government official." Pet. App. 62a. Those social costs, "as *Harlow* teaches, weigh[] heavily against discovery." *Id*. at 63a. Discretion in discovery, as in other areas of the law, must be guided by the relevant public policies, and should not "var[y] like the Chancellor's foot." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), *quoting Gee v. Pritchard*, 2 Swanston, *403, *414, 36 Eng. Rep. 670, 674 (1818) (Eldon, L.C.). *See also*, *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418-419 (1978) (language of discretion does not guide its exercise; relevant policy considerations do).

To effectuate *Harlow*, therefore, the Court should adopt Judge Ginsburg's rule that discovery will not be permitted simply because evidence is relevant and material, but only if, together with what plaintiff has, it is likely to make his case. Unless such a clear restriction on discovery is adopted, the litigation burdens and delays against which the clear and convincing standard is directed will be reintroduced through discovery, and *Harlow* will be undone.

C. THE OBJECTIONS TO THE CLEAR AND CONVINCING STANDARD DO NOT WITHSTAND SCRUTINY.

Three principal objections have been raised to the clear and convincing standard: 1) Chief Judge Edwards argues that the standard is unnecessary to protect the values identified in *Harlow*; 2) Crawford-El's amicus argues that the standard is not sanctioned by history for motive-based constitutional torts; and 3) Crawford-El argues that the standard will "Balkanize"

the rule announced in *Harlow*. None of these points is persuasive.

1. Chief Judge Edwards argued below that, as a result of clarifications in the law of summary judgment since *Harlow*, "Rule 56 is now more than adequate to dispose of unmeritorious claims without . . . new evidentiary standards . . .." Pet. App. 85a.

While *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), may make it easier to obtain summary judgment when motive is at issue, the true test is how the standards are in fact applied. *See Galloway v. United States*, 319 U.S. 372, 395 (1943) ("Nor is the matter greatly aided by substituting one general formula for another . . .. The matter is essentially one to be worked out in particular situations and for particular type of cases."). In practice, in cases involving motive under ordinary standards of proof, it remains very difficult to obtain summary judgment, for the reasons stated in *Harlow*. *See generally* 10A C. Wright, A. Miller & M. Kane, FEDERAL PRACTICE AND PROCEDURE (2d Ed., 1983), § 2730, 1997 Supp. at 64-80 (noteworthy post-1986 decisions involving motive denying summary judgment vastly outnumber those granting it).

Indeed, the facts of this case demonstrate that *Celotex* and *Liberty Lobby* provide *no* protection for public officers in Britton's position. For, as weak as Crawford-El's case is, the dissenters below would have denied summary judgment in the absence of a heightened standard of proof and required a jury trial of his claim. They would do so notwithstanding that:

a) The notion that Britton would choose to punish Crawford-El by giving his property to his family is manifestly

unlikely. See Pet. App. 73a. (Henderson, J., concurring) ("absurd"). Surely, if Britton had wanted to punish Crawford-El by depriving him of his property, she would have found means of doing so more certainly, and more permanently -- particularly when Crawford-El was undergoing such a complicated series of moves. Indeed, Crawford-El quotes her as saying as much to his brother-in-law Carter; namely, that she could simply "throw it in the trash." Pet. App. 186a, ¶31.

b) Britton's stated reason for refusing to forward inmates' property to their federal destinations was that she had been advised that the federal prisons would not accept it. J.A. 37; Pet. App. 185a, ¶30; 186a, ¶31. This was confirmed by Crawford-El's own evidence showing i) the federal policy was at best unclear,[17] but that ii) because it permitted only a small amount of inmate property, it surely excluded Crawford-El's three very heavy boxes. J.A. 52.

c) Crawford-El's strongest evidence that Britton's "diversion" of his boxes was nevertheless the product of a motive to punish him was evidence of her exasperation with

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[17]The letter from federal prison administrator Wise (J.A. 52) written some three months after Britton gave Crawford-El's property to his family, showed that federal policy required "clarification." It also showed why: there are "significant differences between D.C. D[epartment] O[f] C[orrections] and [federal] B[ureau] O[f] P[risons] property policies and differences among individual BOP facilities." Indeed, the letter recognized that the application of federal policy would remain unclear in particular cases: "In special cases, . . . contact individual facility . . . staff for permission prior to mailing any inmate personal property to a B.O.P. facility."

him personally in connection with his contacting the press.[18] But his own evidence showed that he was not singled out for such a "diversion;" instead Britton treated other inmates similarly, who (for all his evidence shows) were not similarly involved with the press.

Thus, the motive Crawford-El attributed to Britton was extremely unlikely; he did not present evidence that she was hostile to the more general class at which her policy-based decision was directed; and he did not impeach, but instead buttressed, her stated non-retaliatory reason.

Nevertheless, the trial judge (Pet. App. 131a) and five appellate judges (*id.* at 92a-94a) have all opined that Crawford-El's showing was sufficient to defeat summary judgment and require a jury trial. We submit that, if this kind of evidence requires a trial, that fact alone demonstrates forcefully that *Harlow* and the values it sought to protect will be undermined without an enhanced burden of proof.[19]

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[18]His best evidence of Britton's hostility was the purported 1986 statement (made years prior to the 1989 diversion of property addressed by this case) that she would "make it as hard for him as possible" because he had tricked her into unknowingly admitting a reporter. Pet. App. at 178a, ¶12. This reaction was understandable under the circumstances and hardly constitutes evidence of improper conduct on her part.

[19]Contrary to the suggestion in Chief Judge Edwards' opinion (Pet. App. 91a), there is nothing in the Federal Rules of Civil Procedure that precludes the adoption of an enhanced standard of proof. To the contrary, both *Matsushita Electric Industrial Co., Ltd.* and *Anderson v. Liberty Lobby, Inc.* involved enhanced standards of proof, and both make it absolutely clear that the burden of proof is governed by the applicable substantive law. *Matsushita, supra*, 475 U.S. at 588.

2. William G. Moore, Jr. argues (Amicus Br. at 15-16) that it is inappropriate to require a plaintiff to defeat an assertion of qualified immunity by clear and convincing evidence in motive-based cases because "there is no reason to think that in passing § 1983 Congress intended to afford public officials a special immunity against claims of unconstitutional motive." *Id.* at 15. He further asserts that "the fact that there is no common law antecedent for any special immunity for unconstitutional motive torts strongly weighs against finding congressional intent to recognize such an immunity." *Id.* This argument fails for several reasons.

First, while history is relevant to ascertain what categories of official may assert immunity defenses and whether the immunity afforded is absolute or defeasible, *Harlow* itself demonstrates that history does not define the precise contours of the qualified immunity defense. Indeed, *Harlow* "completely reformulates qualified immunity along principles not at all embodied in the common law . . .." *Anderson v. Creighton*, 483 U.S. at 645. And, as discussed, the court of appeals has shaped qualified immunity in the motive-based torts context pursuant to the same policy reasons informing *Harlow*.

Second, it is illogical to base the nature of § 1983 liability for damages against state officials on what Congress intended in 1871, when such liability was not in fact imposed until at least 1941, if not 1961. *See Monroe v. Pape*, 365 U.S. 167, 213-220 (1961) (Frankfurter, J., dissenting in part). It is also unclear what the "common law antecedents" would be to the motive-based torts enforceable under § 1983. Moreover, it is inconsistent to insist that the burden of proof utilized be that employed in analogous circumstances in 1871, while at the same time arguing (Br. at 12 n.6) that the discovery available to prosecute such claims must be different. See 6 WIGMORE

EVIDENCE (Chadbourn rev. 1976) §§ 1845, 1846, 1856-1858. (Discovery virtually non-existent at common law and quite limited in chancery).

Third, courts have applied the clear and convincing standard of proof in a variety of contexts, where important policies were deemed to warrant doing so, and did so long before 1871. *See, e.g. United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 380-382 (1887) holding that there must be clear and convincing evidence to set aside instruments of title on the ground of fraud or mistake; invoking the importance of stability of title; and relying on, among other cases, *Lyman v. United Ins. Co.*, 2 Johnson 630 (New York Chancery Ct., 1817), and *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 316 (Mass. 1871). And this Court has long employed that well-established standard to protect important public policies. *See, e.g., United States v. Iron Silver Mining Co.*, 128 U.S. 673, 677 (1888) (invoking the "presumption that all the steps required by law had been observed" and "the immense importance . . . of the stability of titles dependent on these instruments").

3. Finally, Crawford-El argues that providing special rules for motive-based tort cases would impermissibly "Balkanize" the law of qualified immunity, citing *Anderson v. Creighton*, 483 U.S. at 646. But a special rule for this particularly vexing category of cases hardly creates "exceptions at the level of detail" that would likely render "officials unable to determine if they are protected," like that proposed in *Creighton*. *Id.* To the contrary, adoption of a "clear and convincing" standard is merely a logical extension of the policy driving the "clearly established" standard adopted in *Harlow*, and is consistent with the court's intention to apply a consistent "across the board" rationale to all qualified immunity cases.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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